

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7373

Joint Petition of Vermont Electric Power Company, Inc.,)
Vermont Transco, LLC, and Central Vermont Public)
Service Corporation for a certificate of public good,)
pursuant to 30 V.S.A. Section 248, authorizing the)
construction of the Southern Loop Transmission)
Upgrade Project)

Order entered: 8/21/2008

ORDER RE: FERENBACHS' MOTION TO STRIKE
PORTIONS OF PETITIONERS' PREFILED TESTIMONY

On August 1, 2008, Carl Ferenbach and Judy W. Ferenbach (collectively, the "Ferenbachs") filed an objection to portions of the prefiled rebuttal testimony of Christine Carr and of the joint prefiled rebuttal testimony of Steven P. Damiano, Brian Connaughton and John Stamatov, and moved to strike portions of such testimony. Vermont Electric Power Company, Inc., Vermont Transco, LLC, and Central Vermont Public Service Corporation (collectively, the "Petitioners") filed a reply to the motion to strike on August 13, 2008. The Ferenbachs filed a response to the Petitioners' reply on August 18, 2008.

The Ferenbachs object to two answers from the testimony of Ms. Carr and to four answers from the testimony of Messrs. Damiano, Connaughton and Stamatov on the ground that their answers involve legal conclusions and/or legal opinions by witnesses who are not qualified to render legal opinions. The portions of the six answers that the Ferenbachs move to strike relate to two subject areas. Two responses of Ms. Carr (A.7 and A.8) and two responses of Messrs. Damiano, Connaughton and Stamatov (A.19 and A.26) include statements that Vermont Electric Power Company, Inc. and Vermont Transco, LLC (collectively, "VELCO") do not have authority as an easement holder to install gates or otherwise control access to property it does not

own. Two other responses of Messrs. Damiano, Connaughton and Stamatov (A.4 and A.9) include statements about applicable environmental law criteria.

In general, the rules of evidence applicable to civil cases in a Vermont superior court are followed in proceedings before us although we have discretion under certain conditions to allow evidence not admissible under the rules of evidence. 3 V.S.A. § 810 and Rule 2.216 of our Rules of Practice.

Vermont court decisions have been consistent with the trend of authority in recent decades that has been more favorable to opinion testimony. See, e.g., *Vermont v. Norton*, 134 Vt. 100 (1976) in which the opinions of law enforcement officers that a defendant was under the influence of intoxicating liquor were held to be admissible. The Vermont Supreme Court's decision in *Jordan v. Nissan North America, Inc.*, 2004 VT 27, appears to acknowledge under Rule 701 of the Vermont Rules of Evidence that the testimony of a lay witness may incorporate the witness's understanding of the law in a jury trial (witness familiar with federal labeling obligations applicable to automobile makers permitted to testify based on her understanding of the law).¹ Furthermore, we note that many of the concerns about opinion testimony by non-expert witnesses that would exist in a civil trial by jury (especially with respect to legal opinions and conclusions) do not exist with respect to proceedings before us.

Because of the nature of their jobs, training or experience, a non-lawyer witness may become familiar with relevant legal frameworks and other aspects of the law or acquire some perception of what the law may permit. The communication of any understanding of the law by a witness can often be useful and helpful to us in a proceeding. However, this is not to suggest that we will construe the understandings or perceptions of a witness about the law as anything other than that witness's understandings or perceptions (no matter how phrased) or that we will give them weight as legal conclusions or opinions. In any case, the parties will be able to brief any relevant legal issues as appropriate.

1. Rule 701 of the Vermont Rules of Evidence governs opinion testimony by lay witnesses. It provides that: If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions and inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

In the case of Ms. Carr, her employment as a paralegal for the VELCO Right-of-Way Team would likely provide her with an understanding about how VELCO views its authority to restrict access to property on which it holds an easement. Whether accurate or not, VELCO's beliefs as to what the law would permit in terms of installing gates or other deterrents on its rights-of-way are relevant and helpful even to the other parties in the docket. Similarly, the experience of Messrs. Damiano, Connaughton and Stamatov in the environmental area would reasonably be expected to provide them with some familiarity with Vermont laws affecting the environment such as the classifications of wetlands under the Vermont Wetland Rules, the applicable Act 250 criteria, and the relevance of certain Act 250 criteria in a Section 248 proceeding. The recitation of their understanding of the legal framework is helpful and useful, among other ways, in providing relevant context for the rest of their answers.

Accordingly, the Ferenbachs' motion to strike portions of the prefiled rebuttal testimony is denied.²

SO ORDERED.

2. In view of our decision to deny the motion to strike, we need not address other issues raised by the Petitioners in their reply to the motion to strike.

Dated at Montpelier, Vermont, this 21st day of August, 2008.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: August 21, 2008

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)